

The Appeals Board finds that the parties are subject to the provisions of the Kansas

Workers Compensation Act for calendar years 1992 and 1993 under K.S.A. 44-505. For purposes of preliminary hearing only, the finding of the Administrative Law Judge to the contrary is reversed.

The respondent is a sole proprietor who owns and operates an automotive detail shop in Salina, Kansas. Respondent testified that he deliberately maintains a gross annual payroll less than \$10,000.00 to avoid being subject to the Kansas Workers Compensation Act and the requirement that he obtain the appropriate insurance. Respondent's payroll did not exceed \$10,000.00 for calendar years 1989, 1990, and 1991. Respondent also testified that he did not expect his payroll to exceed \$10,000.00 for calendar year 1992. Respondent and his bookkeeper also testified that they were not aware contract labor and wages would exceed \$10,000.00 until January 1993, when respondent's bookkeeper did the fourth quarter bookkeeping.

Respondent's 1992 income tax return indicates that a total of \$14,618.63 was paid for contract labor and wages for the calendar year. Out of that figure approximately \$952.50 was paid to a relative of respondent and, therefore, should not be included in the amount of wages paid. In addition, \$50.00 was paid to another detail shop and is not to be included as payroll.

The amounts denoted as contract labor should be included with the amounts denoted as wages in arriving at total payroll for purposes of the application of K.S.A. 44-505 as respondent testified that what he denoted as contract labor was the amount he paid for part-time or temporary help who performed the same job functions as those individuals who were paid wages, except the above-mentioned \$50.00 payment to another detail shop. Therefore, it is uncontroverted that respondent had a payroll greater than \$10,000.00 for calendar year 1992.

The specific statutory authority that controls this issue is found in K.S.A. 44-505(a)(2) that provides:

"(a) Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workmen's compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:...

(2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$10,000 for all employees **and** wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$10,000 for all employees, except that no wages paid to employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the gross annual payroll of such employer for purposes of this subsection;..."
(Emphasis ours.)

In order to avoid being subject to the provisions of the Kansas Workers Compensation Act, the above statute requires the employer to meet a two-prong test. First, the employer must not have had an annual payroll for the preceding calendar year greater than \$10,000.00. Secondly, the employer must reasonably estimate that it will not have a gross annual payroll for the current calendar year of more than \$10,000.00 for all employees excluding family members. For calendar year 1992, the respondent failed to satisfy the second prong of this two-part test.

The Appeals Board finds that for calendar year 1992, respondent could not have reasonably estimated that his payroll would not exceed the \$10,000.00 figure. At all times, respondent had access to the books and records of his business operation and, therefore, would have had access to the quarterly earnings and expenses. Although it may be true that respondent could reasonably believe that his gross annual payroll would not exceed the sum of \$10,000.00 at the beginning of the calendar year, it is not unreasonable to require the estimate to be made at "reasonable" times throughout the calendar year for purposes of this test.

The Kansas Court of Appeals in the recent decision of Dan Fetzer v. Mark Boling, d/b/a Boling Construction Co., Docket No. 69,248, held that K.S.A. 44-501(g) requires K.S.A. 44-505(a)(2) to be liberally construed. The Court held that the employer's estimate of payroll must be reasonable in both the manner and method as to how and when it is to be made. Whether the estimate is reasonable is a question of fact to be determined from the facts and circumstances of each case.

Claimant alleges bilateral carpal tunnel syndrome that developed during the period of November and December 1992 through January 1993. Therefore, claimant's symptomatology began at a time when respondent would have had access to the earnings and expense records from a minimum of ten months of operations. In addition, respondent was experienced in the operation of his detail business and, therefore, had the experience and knowledge to reasonably estimate gross annual payroll based upon the amount of business that was being generated in the fourth quarter of 1992. The Appeals Board finds that respondent in October and November could have, and should have, reasonably estimated his payroll would exceed \$10,000.00. Therefore, the Appeals Board finds that the parties are subject to the Kansas Workers Compensation Act for the calendar year of 1992.

Respondent argues that he is not required to have workers compensation insurance for calendar year 1993. Returning to the two-prong test of K.S.A. 44-505(a)(2), by implication an employer is subject to the provisions of the Kansas Workers Compensation Act when the total gross annual payroll for the preceding calendar year is greater than \$10,000.00. As his payroll exceeded \$10,000.00 in 1992, respondent is subject to the Act for 1993.

AWARD

WHEREFORE, it is the finding, decision and order of this Appeals Board that the Preliminary Hearing Order of Administrative Law Judge George R. Robertson, dated December 22, 1993, is reversed and that this proceeding is hereby remanded to the Administrative Law Judge who is directed to enter a finding for preliminary hearing purposes that the parties are subject to the provisions of the Kansas Workers Compensation Act and for such additional proceedings as may be required.

IT IS SO ORDERED.

Dated this ____ day of March, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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